LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

A. RENEE CALLAHAN
PHONE (202) 777-7723

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

December 18, 2003

BY ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte Presentation,* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Yesterday, Kimberly Scardino, Director - Federal Advocacy, MCI, and Lisa Youngers, Attorney - Federal Advocacy, MCI, and Ruth Milkman and the undersigned, Lawler, Metzger & Milkman, counsel to MCI, met with Thomas Navin, Gina Spade, Jon Minkoff, and Jeffrey Tignor of the Competition Policy Division of the Wireline Competition Bureau. During that meeting, MCI discussed the importance of the pick-and-choose rule, as reflected in the attached presentation and MCI's pleadings in the above-captioned docket. In addition, to the extent that the FCC desires to improve the existing pick-and-choose process, MCI urged the Commission to implement national rules providing for expedited adoption procedures similar to those required by the California Public Utilities Commission. As part of that discussion, MCI provided copies of the California rules, which are also attached.

Pursuant to the Commission's rules, this letter is being provided to you for inclusion in the public record of the above-referenced proceeding.

Sincerely,

A. Renée Callahan

A. Renée Callahan

Attachments

cc: Thomas Navin
Gina Spade
Jon Minkoff
Jeffrey Tignor

Pick-and-Choose Rule: Let It Be

CC Docket Nos. 01-338, 96-98, 98-147

December 17, 2003

Overview

- If it ain't broke, don't fix it: the FCC should retain the current pick-and-choose rule.
- The FCC's SGAT proposal was opposed by the vast majority of commenters, including competitive LECs, incumbent LECs, and state commissions.
- The BOC proposal to require carriers to opt into agreements in their entirety is flatly inconsistent with the statute, and indefensible in court.

As a Matter of Law, It is Difficult to Move Far From the Current Rule

- **Plain language of the Act** : Section 252(i) expressly states that *any* interconnection service or element must be made available to requesting carriers.
- **Supreme Court**: Current interpretation of § 252(i) "tracks the pertinent statutory language almost exactly" and is the "most readily apparent" reading of § 252(i)
- **FCC's prior statements**: In briefs to the Supreme Court and the U.S. Court of Appeals for the Eighth Circuit, the FCC stated that the existing definition is the only reasonable interpretation of § 252(i)

Sound Public Policy Favors Retention of the Current Rule

- Current pick-and-choose rule helps to balance the overwhelming bargaining power of ILECs, and prevent discrimination.
- Incumbent LECs have provided no record evidence that the current rule inhibits voluntary negotiations.
- Carriers use current pick-and-choose rule to:
    - Craft customized agreements consistent with business plans
    - Avoid re-litigation of previously decided issues
    - Solidify non-disputed terms so parties can focus efforts on unresolved issues
    - Enter the market quickly/efficiently by avoiding prolonged negotiations or resource-intensive arbitrations.

Problems with the FCC's SGAT Proposal

- SGATs are inadequate to perform the role the FCC envisions.
  - Twenty states do not have effective SGATs on file.
    - SGATs were rejected and never refiled.
    - Previously-approved SGATs have been withdrawn.
    - Some states concluded there was no need for an approved SGAT.
  - Where SGATs are on file, problems remain.
    - One-third of the SGATs are outdated and do not include federal/state requirements or arbitration results.
    - Some SGATs were uncontested when filed, and contain terms unilaterally imposed by incumbent LECs that likely affect the advisability of relying on SGATs alone.
- Increased number of arbitrations likely for CLECs under the SGAT proposal.

Streamlined Rules for the Current Pick-and-Choose Process

- To better serve the goals of 252(i), the FCC should adopt procedural rules as used in California.
  - Carriers should be able to file unilaterally for adoption of terms/agreements.
  - ILECs should respond to a pick-and-choose request within expedited time frames.
  - ILECs must be prohibited from changing the underlying agreement being adopted.
  - ILECs that file for arbitration of an adoption request should be required to demonstrate why the request does not meet the requirements of the pick-and-choose rule.
  - Undisputed terms should become effective immediately.

LEXSEE 2000 CAL. PUC LEXIS 864

RESOLUTION 181. Revises Resolution ALJ-178 Implementing the Provisions of Section 252 of the Telecommunications Act of 1996

Resolution ALJ-181

California Public Utilities Commission

2000 Cal. PUC LEXIS 864

October 5, 2000

PANEL: [*1] Administrative Law Judge Division

Wesley M. Franklin, Executive Director; Loretta M. Lynch, President; Henry M. Duque, Josiah L. Neeper, Richard A. Bilas, Carl W. Wood, Commissioners

OPINION: RESOLUTION

The Telecommunications Act of 1996 (the Act) creates certain obligations and duties of telecommunications carriers in order to encourage competition in the telecommunications market. Section 251 of the Act describes these duties and obligations, including interconnection and access to services and network elements. Section 252 provides that incumbent local exchange carriers must enter into interconnection agreements with other telecommunications carriers. Section 252 of the Act provides specific standards for the approval of these agreements by the state regulatory commission. Under this section of the Act a state commission may assist negotiating parties in reaching agreements through mediation and / or compulsory arbitration. Section 252 also requires a local exchange carrier to make available any interconnection, service, or network element provided under an agreement approved under this section to any other requesting telecommunications carrier, upon the same terms and conditions [*2] as those provided in the agreement.

On July 17, 1996, we adopted Resolution ALJ-167 which provided interim rules governing the procedures to be followed when the Commission has received a request. We amended those rules on September 20, 1996 in ALJ-168, with further amendments on June 25, 1997 in ALJ-174, and on November 18, 1999 in ALJ-178. Today we approve revised rules to clarify the process that various types of telecommunications carriers should use under 252(i) to adopt the provisions of a previously-approved agreement. We also eliminate Rule 5, the Application for Approval of a Statement of Generally Available Terms (SGAT). This provision of the Act applies only to Pacific Bell (Pacific), and Pacific filed its SGAT on February 19, 1997, in Application (A.) 97-02-020. Pacific's SGAT was allowed to go into effect on an interim basis, pending further Commission analysis. On August 4, 1997, Pacific filed to withdraw its SGAT, and the Commission dismissed the application and closed the proceeding in Decision (D.) 98-07-026.

We do not anticipate that Pacific will elect to refile its SGAT, so we have deleted the rules relating to the filing of an SGAT.

We also require that any [*3] potential Competitive Local Exchange Carrier which intends to make use of these rules must have been granted a Certificate of Public Convenience and Necessity (CPCN), or at least have filed an application for a CPCN, prior to applying to have an interconnection dispute mediated, or an agreement approved or arbitrated. Commission resources are scarce, and we want to assure ourselves that any carrier that makes use of these processes fully intends to enter the local market in California.

Also, there are rule changes that clarify matters with respect to discovery procedures and timing, participation of non-parties, the scope of comments on a draft arbitrators report, applicable ex parte rules, the definition of submission date, filing requirements for conformed agreements, filing requirements for 252(i) filing by telecommunications companies not subject to the advice letter process and access to copies of negotiated agreements.

We also make other minor modifications to update the rules.

We will continue to honor the principles contained in prior Commission resolutions implementing the provisions of Section 252 of the Act, to the extent they are not inconsistent with the changes [*4] adopted today.

The service list to be used for all Section 252 filings is the "271 / Arbitration" service list in Docket Rulemaking (R.) 93-04-003 / Investigation (I.) 93-04-002 / R.95-04-043 / I.95-04-044. The current Service List may be found on the Commission's website under "Service Lists." This service list must be used for all filings received under these rules, including requests for approval of any agreements, responses, comments, advice letters, etc., until a more focused service list is established in any particular proceeding. It should be pointed out that failure to properly serve an application under these rules will result in the application's rejection. Failure to allow for sufficient time to rehabilitate an improperly served application may result in the agreement's rejection. We believe that an agreement's rejection would have the effect of "re-starting the clock" back to the beginning of negotiations. We, therefore, encourage all parties filing documents under these rules to be most attentive to all procedural requirements. The short timelines contained in the Act give us no choice but to interpret all of our rules in a strict manner.

Second, we emphasize, once [*5] again, that our Rules of Practice and Procedure (Rule 3.2) provide a method for computing time for determining time limits. With one exception, we intend that our Rule 3.2 will apply to time limits provided in these rules also. The one exception concerns the rule that arbitration hearings will conclude within 10 days of initiation. If the tenth day of a proceeding falls on a weekend then hearings must be completed by the preceding workday. Of course, we also provide in these rules that the Arbitrator, for good cause, has authority to extend the number of hearing days, but not the overall time limits.

Third, we require that all agreements to which Pacific is a party, which were arbitrated since our decision in the Open Access and Network Architecture Development (OANAD) docket, D.99-11-050, shall incorporate Pacific's rates for all elements the Federal Communications Commission has determined meet the Act's "necessary and impair" standards and are, therefore, classified as Unbundled Network Elements (UNEs). As final prices are developed for additional elements, those prices shall be incorporated into existing interconnection agreements on a going forward basis. In the case of Verizon [*6] (formerly GTE California), interim rates are still in effect. However, once final UNE rates are adopted in the OANAD proceeding, those rates should be reflected in existing agreements with Verizon. Therefore, we order that all agreements arrived at by arbitration include the provision that all arbitrated rates for unbundled elements will be subject to change in order to mirror the rates adopted in OANAD.

Finally, in Resolution ALJ-167 we ordered Pacific and GTE California Incorporated (GTEC) to submit certain information designed to assist us in managing the expected workflow associated with reviewing these agreements (Resolution ALJ-167, page 3). In Resolution ALJ-168, we noted that while both Pacific and GTEC had provided a list of parties who had requested negotiations pursuant to the Act, as we requested, we wanted them to augment the request to make it more useful for our planning purposes. We continue to request not only a list of those who have requested negotiations but also the date on which that request was initially made and ask that these lists be updated every two weeks unless no new requests have been received in the intervening period. They should be provided to the [*7] Chief Administrative Law Judge, for the sole use of the Commission in carrying out the provisions of this resolution.

Comments on Draft Resolution

The draft resolution of the Administrative Law Judge Division was mailed to the parties in accordance with Public Utilities Code Section 311(g). Comments were filed on September 20, 2000, by AT&T Communications of California, Inc. and on September 25, 2000, by Pacific Bell Telephone Company and The Utility Reform Network / Office of Ratepayer Advocates. The comments were taken into account, as appropriate, in finalizing this Resolution.

IT IS RESOLVED that the rules appended to this Resolution for implementation of Section 252 of the Telecommunications Act of 1996 are hereby adopted for implementation.

The Executive Director shall cause a copy of this resolution to be mailed to each appearance in the "271 / Arbitration" docket, R. 93-04-003 / I. 93-04-002 / R.95-04-043 / I.95-04-044, and to each Local Exchange Carrier and Competitive Local Exchange Carrier holding a certificate of public convenience and necessity to provide service in California.

Due to the need to have revised rules in effect, this resolution becomes [*8] effective today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting on October 5, 2000, the following Commissioners approving it:

California Public Utilities Commission Revised Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996

Rule 1. General Rules

Rule 1.1 Definitions
The terms defined in the Telecommunications Act of 1996 are generally applicable to these rules. Certain exceptions are as follows:

Commission means the California Public Utilities Commission.

FCC means the Federal Communications Commission.

1996 Act means the Telecommunications Act of 1996; unless noted otherwise, all references to sections and subsections are to the Communications Act of 1934 as amended by the 1996 Act.

Mediation means a process in which the Commission assists negotiating parties to reach their own solution.

Arbitration means the submission of a dispute to a Commission-appointed neutral third party to be resolved.

Request means an application or Advice Letter to the Commission for relief under the 1996 Act.

Request for Negotiation means the first date on which an incumbent [*9] local exchange carrier receives a written request to negotiate pursuant to the 1996 Act.

Arbitrated Agreement means the entire agreement filed by the parties in conformity with the Arbitrator's Report.

Resolved Issues means those issues submitted to and decided by the Arbitrator in compliance with Subsection 252(b)(4)(C).

Rule 1.2 Filing Procedures
All petition filings under these rules shall comply with Rule 1 and Rules 2-3.4 of the Commission's Rules of Practice and Procedure. In addition the final conformed agreement filed pursuant to these rules shall also be filed in electronic form (PC compatible diskette) in accordance with instructions provided by the Commission's Webmaster.

Rule 1.3 Who is entitled to File?
Only those carriers which have already been granted a Certificate of Public Convenience and Necessity (CPCN) for providing local exchange service, or which have an application pending at this Commission for a CPCN for providing local exchange service, are entitled to make use of the Section 252 processes described in these rules. Parties shall include in their filing, the decision number of the decision which granted them a CPCN or the application [*10] number if a CPCN application is pending. Any entity that is not required to have a CPCN but qualifies as a "telecommunications carrier" that is authorized to provide "telecommunications services" to the public consistent with the Act, may utilize the procedures set forth in Rule 7.

Pacific Bell is exempt from the requirements of this Rule.

Rule 1.4 Conflicting Rules
All petitions filed pursuant to Sections 251 and 252 will be governed by the Commission's Rules of Practice and Procedure unless such rules are in conflict with the rules contained herein. If there is a conflict, the rules herein will apply.

Rule 2. Request for Mediation

Rule 2.1 Who May Request
Any party to a negotiation may file a request at any time that the Commission mediate any differences preventing an agreement. The request shall set forth the identity of all parties to the mediation, and any time constraints on resolution of the issues.

Rule 2.2 Appointment of Mediator
Upon receipt of a request for mediation from a party engaged in negotiations for an agreement for interconnection, services, or unbundling of network elements, the Commission's President or a designee in consultation with [*11] the Chief Administrative Law Judge, shall appoint a qualified Mediator to facilitate resolution of all disputes involved in the negotiations.

Rule 2.3 Parties' Statements
Within 15 days of the filing of a request for mediation, each party to the negotiations shall submit to the Mediator a written statement summarizing the dispute and shall furnish such other material and information to familiarize the Mediator with the dispute. The Mediator may require any party to supplement such information.

Rule 2.4 Initial Mediation Conference
Within 10 days of the filing of the parties' statements, the Mediator shall convene an Initial Mediation Conference. At the Initial Mediation Conference, the parties and Mediator shall discuss a procedural schedule. The parties and Mediator shall also attempt to identify, simplify, and limit the issues to be resolved. Each party should be prepared to present its case informally to the Mediator at the Initial Mediation Conference.

Rule 2.5 Conduct of the Mediation
The Mediator, subject to the rules contained herein, shall control the procedural aspects of the mediation.

Rule 2.6 Mediations Closed to the Public
To provide for effective [*12] mediation, participation in mediations is strictly limited to the parties that were negotiating an agreement contemplated by Sections 251 and 252. All mediation proceedings shall remain closed to the public.

Rule 2.7 Caucusing
The Mediator is free to meet and communicate separately with each party. The Mediator shall decide when to hold such separate meetings. The Mediator may request that there be no direct communication between the parties or between their representatives without the concurrence of the Mediator.

Rule 2.8 Joint Meetings
The Mediator shall decide when to hold joint meetings with the parties and shall fix the time and place of each meeting and the agenda thereof. Formal rules of evidence shall not apply for these meetings or any portion of the mediation proceeding.

Rule 2.9 No Stenographic Record
No record, stenographic or otherwise, shall be taken of any portion of the mediation proceeding.

Rule 2.10 Exchange of Additional Information

If any party has a substantial need for documents or other material in the possession of another party, the parties shall attempt to agree on the exchange of requested documents or other material. Should they [*13] fail to agree, either party may request a joint meeting with the Mediator who shall assist the parties in reaching agreement. At the conclusion of the mediation process, upon the request of a party which provided documents or other material to one or more mediating parties, the recipients shall return such documents or material to the originating party without retaining copies thereof.

Rule 2.11 Request for Further Information by the Mediator
The Mediator may request any mediating party to provide clarification and additional information necessary to assist in the resolution of the dispute.

Rule 2.12 Responsibility of the Parties to Negotiate and Participate
The parties are expected to initiate proposals for resolution. Each party shall provide a justification for any terms of resolutions that it proposes.

Rule 2.13 Authority of the Mediator
The Mediator does not have the authority to impose a settlement on the parties but shall attempt to help them reach a satisfactory resolution of the dispute. The Mediator is authorized to make only to the parties oral and written recommendations of resolution at any point in the mediation.

Rule 2.14 Reliance by Mediator Upon [*14] Experts
During the mediation the Mediator may rely on experts retained by, or on the Staff of, the Commission. Such expert(s) shall assist the Mediator during the mediation process.

Rule 2.15 Impasse and Recommended Resolution of Mediator
In the event that the parties fail to reach resolution of their differences, the Mediator, before terminating the mediation, shall submit to the parties a final proposed agreement. If a party does not accept the Mediator's proposed agreement, it shall advise the Mediator within 10 days of the Mediator's issuance of the proposed agreement.

Rule 2.16 Termination of the Mediation
The mediation shall be terminated upon any of the following: (1) execution of a mediated agreement by the mediating parties, (2) serving of a written declaration on the other parties and the Mediator, by a party that the mediation proceedings are terminated, or (3) presentation of a written declaration to the parties and to the Commission by the Mediator that further efforts at mediation would be futile. The written Mediator's declaration shall be conclusory and neutrally worded so as not to permit any negative inference respecting any party to the mediation.
[*15]
Rule 2.17 Confidentiality

a. The entire mediation process is confidential, except for the terms of the final mediated agreement. The parties, the Mediator and any participating Commission experts shall not disclose information regarding the mediation process, except the final mediated terms, to any Commissioner or nonparticipating Commission Staff, nor to any other third parties, unless all parties agree to disclosure; provided, however, that the Commissioners may be informed of the identity of the participants and in the most general manner of the progress of the mediation. The confidentiality of the mediation is covered by Rule 51.9 of the Commission's Rules of Practice and Procedure.

b. Except as the parties otherwise agree, the Mediator shall keep confidential any written materials or other information submitted to the Mediator. All records, reports, or other documents received by the Mediator while serving in that capacity shall remain confidential. The mediating parties and their representatives are not entitled to receive or review any such materials or information submitted to the Mediator by another party or representative, without the concurrence of the submitting [*16] party. At the conclusion of the mediation, the Mediator shall return to the submitting party all written materials and other information which that party had provided the Mediator.

Rule 2.17.1 Confidentiality to be Maintained in Subsequent Proceedings
The Mediator shall not be compelled to divulge records, documents and other information submitted to him or her during the mediation proceeding, nor shall the Mediator be compelled to testify in regard to the mediation, in any

subsequent adversarial proceeding or judicial forum. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitration, judicial or other proceeding, any of the following: (a) views expressed or suggestions made by another party with respect to a possible resolution of the dispute, (b) admissions made by another party in the course of the mediation, (c) proposals made or views expressed by the Mediator, or (d) the fact that another party had or had not indicated willingness to accept a proposed agreement made by the Mediator.

Rule 2.18 Post-Agreement Procedure
Once the parties reach final agreement during this process, they shall submit [*17] the proposed agreement to the Commission for approval. The proposed agreement should contain a showing that (1) the negotiated agreement would not discriminate against a telecommunications carrier not a party to the mediated agreement; (2) its implementation would be consistent with the public interest, convenience and necessity; and (3) the agreement would meet the Commission's service quality standards for telecommunications services as well as the requirements of all other rules, regulations, and orders of the Commission.

Rule 3. Request for Arbitration

Rule 3.1 Filing
A party to a negotiation entered into pursuant to Section 251 of the 1996 Act may file a request for arbitration.

Rule 3.2 Time to File
A request for arbitration may be filed not earlier than the 135th day nor later than the 160th day following the date on which an incumbent local exchange carrier receives the request for negotiation. The arbitration shall be deemed to begin on the date of the filing before the Commission of the request for arbitration. Parties to the arbitration may continue to negotiate an agreement prior to and during the arbitration hearings. The party requesting arbitration [*18] shall provide a copy of the request to the other party or parties not later than the day the Commission receives the request.

Rule 3.3 Content
A request for arbitration must contain:

a. A statement of all unresolved issues.

b. A description of each party's position on the unresolved issues.

c. A proposed agreement addressing all issues, including those upon which the parties have reached an agreement and those that are in dispute. Wherever possible, the petitioner should rely on the fundamental organization of clauses and subjects contained in an agreement previously arbitrated and approved by this Commission.

d. Direct testimony supporting the requester's position on factual predicates underlying disputed issues.

e. Documentation that the request complies with the time requirements of Rule 3.2 and the CPCN requirement of Rule 1.3.

Rule 3.4 Appointment of Arbitrator
Upon receipt of a request for arbitration, the Commission's President or a designee in consultation with the Chief Administrative Law Judge, shall appoint and immediately notify the parties of the identity of an Arbitrator to facilitate resolution of the issues raised by the request. The Assigned [*19] Commissioner may act as Arbitrator if he/she chooses. The Arbitrator must attend all meetings, conferences and hearings as described in Rules 3.8 and 3.9.

Rule 3.5 Discovery
Discovery should begin as soon as possible prior to or after filing of the request for negotiation and shall continue up until hearings begin, unless the Arbitrator sets a later date for completion of discovery. For good cause, the Arbitrator or Administrative Law Judge assigned to Law and Motion may compel response to a data request; in such cases, the response normally will be required in three working days or less. Once an arbitration request is filed, any motions to compel filed previously which relate to that arbitration should be filed in that docket.

Rule 3.6 Opportunity to Respond
Pursuant to Subsection 252(b)(3), any party to a negotiation which did not make the request for arbitration ("respondent") shall file a response with the Commission within 25 days of the request for arbitration. In the response, the respondent shall address each issue listed in the request, describe the respondent's position on these issues, and identify and present any additional issues for which the respondent seeks [*20] resolution and provide such additional information and evidence necessary for the Commission's review. Building upon the contract language proposed by the applicant and using the form of agreement selected by the applicant, the respondent shall include, in the response, a single-text mark-up document containing the language upon which the parties agree and, where they disagree, both the applicant's proposed language (bolded) and the respondent's proposed language (underscored). Finally, the response should contain any direct testimony supporting the respondent's position on underlying factual predicates. On the same day that it files its response before the Commission, the respondent must serve a copy of the Response and all supporting documentation on any other party to the negotiation.

Rule 3.7 Revised Statement of Unresolved Issues
Within 7 days of receiving the response, the applicant and respondent shall jointly file a revised statement of unresolved issues that removes from the list presented in the initial petition those issues which are no longer in dispute based on the contract language offered by the respondent in the mark-up document and adds to the list only those [*21] other issues which now appear to be in dispute based on the mark-up document and other portions of the response.

Rule 3.8 Initial Arbitration Meeting
An Arbitrator may call an initial meeting for purposes such as setting a schedule, simplifying issues, or resolving the scope and timing of discovery.

Rule 3.9 Arbitration Conference and Hearing
Within 10 days after the filing of a response to the request for arbitration, the arbitration conference and hearing shall begin. The conduct of the conference and hearing shall be noticed on the Commission calendar and notice shall be provided to all parties on the service list.

Rule 3.10 Limitation of Issues
Pursuant to Subsection 252(b)(4)(A), the Arbitrator shall limit the arbitration to the resolution of issues raised in the petition, the response and the revised statement of unresolved issues (where applicable). However, in resolving these issues, the Arbitrator shall ensure that such resolution meets the requirements of the 1996 Act. In resolving the issues raised, the Arbitrator may take into account any issues already resolved between the parties.

Rule 3.11 Arbitrator's Reliance on Experts
The Arbitrator may rely [*22] on experts retained by, or on the Staff of, the Commission. Such expert(s) may assist the Arbitrator throughout the arbitration process.

Rule 3.12 Close of Arbitration
The arbitration shall consist of mark-up conferences and limited evidentiary hearings. At the mark-up conferences, the arbitrator will hear the concerns of the parties, determine whether the parties can further resolve their differences, and identify factual issues that may require limited evidentiary hearings. The arbitrator will also announce his or her rulings at the conferences as the issues are resolved. The conference and hearing process shall conclude within 10 days of the hearing's commencement, unless the Arbitrator determines otherwise.

Rule 3.13 Expedited Stenographic Record
An expedited stenographic record of each evidentiary hearing shall be made. The cost of preparation of the expedited transcript shall be borne in equal shares by the parties.

Rule 3.14 Authority of the Arbitrator
In addition to authority granted elsewhere in these rules, the Arbitrator shall have the same authority to conduct the arbitration process as an Administrative Law Judge has in conducting hearings under the [*23] Rules of Practice and Procedure. The Arbitrator shall have the authority to change the arbitration schedule contained in these rules as long as the revised schedule adheres to the deadlines contained in the 1996 Act.

Rule 3.15 Participation in the Arbitration Conferences and Hearings
Participation in the arbitration conferences and hearings is strictly limited to the parties that were negotiating an agreement pursuant to Sections 251 and 252. Only the two parties involved in the arbitration will be granted party status. Any other interested parties will be placed on the "Information Only" portion of the service list.

Rule 3.16 Arbitration Open to the Public
Though participation at arbitration conferences and hearings is strictly limited to the parties that were negotiating the agreements being arbitrated, the general public is permitted to attend arbitration hearings unless circumstances dictate that a hearing, or portion thereof, be conducted in closed session. Any party to an arbitration seeking a closed session must make a written request to the Arbitrator describing the circumstances compelling a closed session. The Arbitrator shall consult with the assigned Commissioner [*24] and rule on such request before hearings begin.

Rule 3.17 Filing of Post-Hearing Briefs
Each party to the arbitration may file a post-hearing brief within 7 days of the end of the mark-up conferences and hearings unless the Arbitrator rules otherwise. Post-hearing briefs shall present a party's argument in support of adopting its recommended position with all supporting evidence and legal authorities cited therein. The length of post-hearing briefs may be limited by the Arbitrator and shall otherwise comply with the Commission's Rules of Practice and Procedure. The arbitrator may also elect to require the filing of Reply Briefs.

Rule 3.18 Filing of Draft Arbitrator's Report
Within 15 days following the hearings, the Arbitrator, after consultation with the Assigned Commissioner, shall file a Draft Arbitrator's Report. The Draft Arbitrator's Report will include (a) a concise summary of the issues resolved by the Arbitrator, and (b) a reasoned articulation of the basis for the decision.

Rule 3.19 Filing of Comments on the Draft Arbitrator's Report
Each party and any member of the public may file comments on the Draft Arbitrator's Report (DAR) within 10 days of its release. [*25] Such comments shall not exceed 20 pages, unless otherwise authorized by the Arbitrator for the respective parties in arbitration, and shall focus on factual, legal or technical errors in the DAR. In citing such errors, parties shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed. Reply Comments, if ordered by the arbitrator, shall be limited to identifying misrepresentations of law, fact or condition of the record contained in comments.

Rule 3.20 Filing of the Final Arbitrator's Report
The Arbitrator shall file the Final Arbitrator's Report no later than 15 days after the filing date for comments. Prior to the report's release, the Telecommunications Division will review the report and prepare a matrix comparing the outcomes in the report to those adopted in prior Commission arbitration decisions, highlighting variances from prior Commission policy. Whenever the Assigned Commissioner is not acting as the Arbitrator, the Assigned Commissioner will participate in the release of the Final Arbitrator's Report consistent with the Commission's filing of Proposed Decisions as set forth [*26] in Rule 77.1 of the Commission's Rules of Practice and Procedure.

Rule 3.21 Ex Parte Rules Applicable to Arbitration Proceedings
Arbitration proceedings are covered by the ex parte rules found in Article 1.5 of the Commission's Rules of Practice and Procedure.

Rule 3.22 Submission Date
Arbitration proceedings shall be deemed to be submitted with the filing of post-hearing briefs.

Rule 4. Approval of Agreements entered into pursuant to Sections 251 and 252

Rule 4.1 Agreements Reached by Mediation
Rule 4.1.1 Content
Applications for approval of agreements reached by mediation shall contain a copy of the agreement. The agreement shall itemize the charges for interconnection and each service or network element included in the agreement.

Rule 4.1.2 Time for Commission Action
The Commission shall reject or approve the agreement within 90 days of submission of an application for approval. If the Commission fails to act within the specified time then the agreement is deemed approved.

Rule 4.1.3 Comments by Members of the Public
Any member of the public (including the parties to the agreement and competitors) may file comments concerning the mediated [*27] agreement within 30 days of the submission of an application for approval. Such comments shall be limited to the standards for rejection provided in Rule 4.1.4.

Rule 4.1.4 Standards for Rejection

The Commission shall reject an agreement (or portion thereof) if it finds that:

a. the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

b. the implementation of the agreement (or portion thereof) is not consistent with the public interest, convenience, and necessity; or

c. the agreement (or portion thereof) violates other requirements of the Commission, including, but not limited to, quality of service standards adopted by the Commission.

Any order rejecting an agreement shall contain written findings as to the deficiencies.

Rule 4.2 Agreements reached by Arbitration
Rule 4.2.1 Filing of Conformed Agreement
Within 7 days of the filing of the Final Arbitrator's Report, the parties shall file the entire agreement for approval. Concurrently with the filing of the conformed agreement, parties shall each file statements which indicate:

a. the tests the Commission must use to measure an agreement for approval [*28] or rejection,

b. whether the party believes the agreement passes or fails each test, and

c. whether or not the agreement should be approved or rejected by the Commission.

Also, any member of the public may file comments concerning the arbitrated agreement within 10 days of the filing of the agreement. The scope of such comments shall be limited to the standards for review provided in Rule 4.2.3.

Rule 4.2.2 Commission Review of Arbitrated Agreement
Within 30 days following filing of the arbitrated agreement, the Commission shall issue a decision approving or rejecting the arbitrated agreement (including those parts arrived at through negotiations) pursuant to Subsection 252(e) and all its subparts.

Rule 4.2.3 Standards for Review
Pursuant to Subsection 252(3)(2)(B), the Commission may reject arbitrated agreements or portions thereof that do not meet the requirements of Section 251, the FCC's regulations prescribed under Section 251, or the pricing standards set forth in Subsection 252(d). Pursuant to Subsection 252(e)(3), the Commission may also reject agreements or portions thereof which violate other requirements of the Commission, including, but not limited to, [*29] quality of service standards adopted by the Commission.

Rule 4.2.4 Written Findings
The Commission's decision approving or rejecting an arbitration agreement shall contain written findings. In the event of rejection, the Commission shall address the deficiencies of the arbitrated agreement in writing and may state what modifications of such agreement would make the agreement acceptable to the Commission.

Rule 4.2.5 Application for Rehearing

A party, as defined in Rule 3.15, wishing to appeal a Commission decision approving an arbitrated agreement may seek administrative review pursuant to the Commission's Rules of Practice and Procedure.

Rule 4.3 Approval of Agreements Reached by Negotiation
Rule 4.3.1 Content
A request for approval of an agreement reached by negotiation shall be filed as an Advice Letter as provided in General Order 96-A and must state that it is a voluntary agreement being filed for approval under Section 252 of the Act. The request for approval of agreements reached by negotiation shall contain a copy of the agreement and a showing that the agreement meets the standards contained in Rule 2.18. The agreement shall itemize the charges for interconnection [*30] and each service or network element included in the agreement.

Rule 4.3.2 Comments by Members of the Public
Any member of the public (including the parties to the agreement and competitors) may file a protest concerning the negotiated agreement as provided by General Order 96-A. Such protest shall be limited to the standards for rejection provided in Rule 4.1.4.

Rule 4.3.3 Time for Commission Action
The Commission shall reject or approve the agreement based on the standards contained in Rule 4.1.4 within 90 days of submission of the Advice Letter. If the Commission fails to act within the specified time then the agreement is deemed approved.

Rule 4.3.4 Copies of Agreements Reached by Negotiation
Paper copies of negotiated agreements approved by the Commission shall be obtained from one of the carriers which is a party to the agreement, or from the Commission's Telecommunications Division. Carriers and the Commission may charge a reasonable amount for photocopying an agreement. Also, carriers shall include electronic copies of approved interconnection agreements on their websites, or provide electronic copies of approved interconnection agreements. Carriers may charge [*31] a reasonable amount for providing an electronic copy of an agreement.

Rule 5. Intentionally omitted

Rule 6. Approval of Amendments to Agreements Approved Under These Rules

Rule 6.1. Filing Requirements
Amendments to any agreements approved under these rules shall be submitted to the Telecommunications Division by Advice Letter.

Rule 6.2 Amendment Approval Process
Such Advice Letters will be deemed approved without a Commission Resolution 30 days from the date the Advice Letter is filed, unless the Commission takes formal action to reject an Advice Letter. The Director of the Telecommunications Division shall have authority to require additional information explaining the contents of an Advice Letter and to require parties to file supplements to their Advice Letters. The Director of the Telecommunications Division may also stay the effective date of an Advice Letter, pending action by the Commission.

Rule 7. Process for Adopting a Previously Approved Agreement (or Portions of an Agreement) Pursuant to 252(i)

Rule 7.1 Notification and Scope
Requests to adopt an interconnection agreement (or portion(s) of an agreement) previously approved by the Commission [*32] shall be submitted to the Telecommunications Division by Advice Letter or by Letter of Intent.

Certificated carriers which are authorized to file Advice Letters should use the Advice Letter process to notify the Commission of adoption of an approved interconnection agreement, subject to the limitations set forth in Rule 7.2. Other entities which are considered "telecommunications carriers" under the Act, but which are not authorized to file Advice Letters, shall file a Letter of Intent with the Telecommunications Division. One-way paging companies, wireless carriers, or public agencies operating as telecommunications carriers are among those who should file Letters of Intent.

The Advice Letter or Letter of Intent shall state the intent to adopt a specific agreement in its entirety or clearly identify specific portions of a particular agreement the carrier proposes to adopt.

The Advice Letter or Letter of Intent shall be served on the Incumbent Local Exchange Carrier (ILEC) with whom the carrier wishes to execute the interconnection agreement no later than the date the Advice Letter or Letter of Intent is filed with the Commission's Telecommunications Division.

The Advice Letter [*33] or Letter of Intent shall also be mailed to all parties on the "271/Arbitration" Service List referenced in this Resolution.

Neither carrier may propose alterations to the terms of the underlying agreement.

The Telecommunications Division shall maintain a list of Letters of Intent which adopt agreements or portions of agreements on the Commission's website. The list will include the date each Letter of Intent was received, the name of the telecommunications carrier filing the request, and the agreement, or portions of a particular agreement, that telecommunications carrier wants to adopt.

This Rule is limited to those matters consistent with the Act.

Rule 7.2 Incumbent Local Exchange Carrier's Response
Within 15 days of its receipt of the Advice Letter or Letter of Intent, the ILEC shall either send the requesting carrier a letter approving its request or file a request for arbitration based solely on the requirements in § 51.809:

a. Any individual interconnection, service, or network element arrangement contained in any agreement approved by the Commission pursuant to Section 252 of the Telecommunications Act of 1996, must be made available upon the same rates, terms, [*34] and conditions as those provided in the agreement.

b. The obligations of section (a) above shall not apply where the ILEC proves to the state commission that:

> (1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.
>
> (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

c. Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under 252 (f) of the Act.

If the ILEC does not act to approve the request or to file a request for arbitration, the carrier's request will be deemed effective on the 16th day.

Rule 7.3 Rules for Arbitrations conducted Pursuant to this Rule

Rule 7.3.1 Content of Arbitration Request
In any application for arbitration filed pursuant to Rule 7, the ILEC has the burden of proof that the carrier's [*35] request does not meet the requirements of § 51.809. The ILEC's request for arbitration must include facts and evidence that its request for arbitration is consistent with the requirements of § 51.809 and Rule 7.2.

Rule 7.3.2 Effective Date of Arbitrated Agreement
Should the ILEC file for arbitration, the ILEC shall immediately honor the adoption of those terms not subject to objection pursuant to Rule 7.2, effective as of the date of the filing of the arbitration request. Furthermore, to the extent the ILEC seeks arbitration of the costs of a particular interconnection, service or element, the ILEC shall immediately

honor such provisions subject to retroactive price true-up back to the date when the arbitration request was filed, based on the Commission's resolution of the arbitration. The effective date of other disputed issues will be set in the arbitration process and could be made effective retroactive to the date when the arbitration request was filed.

Rule 7.3.3 Modifications to Existing Arbitration Rules
The existing rules for arbitration cases, "Rule 3. Request for Arbitration" remain in effect, with the following exceptions:

Rule 3.1 "Filing" is amended [*36] to state that the ILEC which disputes a carrier's request to adopt another carrier's agreement may file a request for arbitration.

Rule 3.2 "Time to File" does not apply. The ILEC has 15 days from receipt of the Advice Letter to file a request for arbitration.

Rule 3.3 "Content" is amended as follows:

A request for arbitration must contain:

a. A statement of why the request should be denied pursuant to § 51.809.

b. For those cases where the carrier is requesting to adopt portions of an agreement, the ILEC shall include the entire agreement, with the portions the carrier is requesting clearly marked.

c. Direct testimony supporting the ILEC's position

Rule 3.5 "Discovery" is amended as follows:

Discovery should begin as soon as the ILEC files the request for arbitration. For good cause, the Arbitrator or Administrative Law Judge assigned to Law and Motion may compel response to a data request; in such cases, the response normally will be required in three working days or less.

Rule 3.6 "Opportunity to Respond" is amended to delete the statement that the respondent may identify additional issues for which the respondent seeks resolution. The respondent [*37] does not need to file a "mark-up" of the proposed agreement.

Rule 3.7 Does not apply.